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IN THE

Supreme Court of the United States

October Term, 1964

No. 1056

EMILIUS AUGUST TJONAMAN,

Petitioner,

against

A/S GLITTRE and FEARNLEY & EGER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1964

No.

EMILIUS AUGUST TJONAMAN,

Petitioner,

against

A/S GLITTRE and FEARNLEY & EGER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its order and judgment entered the 11th day of January 1965.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 340 F. 2d 290.

The opinion of the United States District Court for the Southern District of New York (Cooper, U.S.D.J.) is unreported and is set forth at page 4a of petitioner's appendix in the Court below.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was dated January 11, 1965 and was entered January 11, 1965.

This Court has jurisdiction under 28 U.S.C. 1254(1).

Statement

This suit was originally brought by petitioner to recover damages for personal injuries sustained by him on March 14, 1958 while he was serving as a member of the crew of the M.S. Ferngrove, a vessel owned and operated by the respondents.

By order of Hon. DUDLEY B. BONSAL, United States District Judge, dated June 29, 1962, with the consent of counsel, the action was transferred from the Civil Jury Calendar to the Admiralty Calendar and the caption amended to reflect this change.

On June 20, 1963, it was stipulated and agreed that the trial was to be conducted in two stages, the first stage encompassing solely the question as to what substantive law was to be applied to petitioner's cause of action against respondents, that is, whether the general maritime law of the United States or the law of the Kingdom of Norway.

After a decision had been rendered on this first stage, the second stage of the trial would commence, which stage would relate to the issues of liability, injuries and damages under whatever law the Court had previously found to be applicable.

After hearing arguments of counsel, and after having considered briefs on the law submitted by both parties, the Court decided, in an opinion read from the bench on April 23, 1963 that the Norwegian law was to be applied. An exception was duly noted to the Court's ruling.

On May 21, 1963, the Court, from the bench, granted respondents' motion to dismiss the libel on the merits, after libelant conceded that he had no cause of action under Norwegian law.

Questions Presented

1. After jurisdiction is established in a Federal Court of the United States, are the laws of the United States, the General Maritime Laws, or the laws of the country of the flag of the ship controlling, each to the exclusion of the others, or are they to be considered in pari materia in the trial of a maritime cause of action between aliens absent a common forum?

2. In the trial of a maritime cause of action between aliens absent a common forum, which of the following criteria is the proper standard to be applied if they do not lend themselves to be considered in pari materia:

a. The laws of the United States

b. The General Maritime Laws

c. The laws of the country of the flag of the ship?

The Facts

Prior to the first stage of the trial, counsel for the parties stipulated that the following set of facts should govern the determination as to whether petitioner was or was not entitled to the protection of United States laws.

1. Petitioner was born in Dutch Guiana on April 1, 1932, and was at all times referred to in this suit a Dutch national.

2. On January 17, 1958, petitioner became a legal resident-alien in the United States.

3. Respondent A/S Glittre was at all times referred to in this suit a Norwegian corporation and the owner of M/S Ferngrove, a Norwegian flag dry cargo vessel, duly registered in Oslo, Norway.

4. Respondent Fearnley & Eger was at all times referred to in this suit a Norwegian partnership and the managing owner of M/S Ferngrove.

5. On February 14, 1958, petitioner obtained employment in New York as a motorman aboard M/S Ferngrove through the offices of the Norwegian Seamen's Union and the Scandinavian Shipping Office, Inc.

6. On February 14, 1958, petitioner signed standard form Norwegian shipping articles in the office of the Norwegian Consulate General in New York. A photostatic copy of the articles signed by appellant (entitled "Hyrekontrakt") and an English translation thereof is annexed hereto and marked exhibits "A" and "B" respectively.

7. Petitioner had been a member of the Norwegian Seamen's Union for approximately two years prior to serving aboard M/S Ferngrove.

8. Petitioner had served aboard other Norwegian vessels as well as aboard Panamanian and Liberian vessels, but had never served aboard U.S. flag vessels prior to February 14, 1958.

9. Petitioner served as a motorman aboard M/S Ferngrove from February 14, 1958 until March 14, 1958 at which time he sustained an injury while in the engineroom of M/S Ferngrove during the course of his employment.

10. On March 14, 1958, M/S Ferngrove was in the Port of Takoradi, Ghana, West Africa.

ARGUMENT

POINT I

The remedial benefits of the Jones Act and the General Maritime Law of the United States should be applied in *pari materia* to the case at bar in line with our congressional policy.

Petitioner does not claim that he is entitled to the protection of the Jones Act, but when General Maritime Law is relied upon the Jones Act may be looked into as to congressional intent.

Judge LEARNED HAND, in clear and concise language set forth Congressional policy in the case of *Stewart* v. *Pacific Steam Navigation Co.*, 3 F. 2d 329 (1924).

> "There is no indication of any purpose to limit it to United States corporations, and it would be highly unreasonable to impute any such purpose to Congress, for the result would be, not only to deprive American seamen of the protection which the Act was meant to give them when serving on foreign ships, *but to give advantage to such ships as against American ships. We all know that the purpose of Congress was directly the opposite.*" (Emphasis supplied.)

Respondents are doing business here in the same manner and to the same extent as any other American steamship company utilizing the American corporation, Fearnley & Eger, Inc. as a medium of doing business in the United States.

The respondent obviously does a great deal of business in the State of New York and utilizes the services of Fearnley & Eger, 39 Broadway, New York, New York, as its regular agent in connection with its shipping business.

The respondents were operating their vessels in direct competition with vessels flying the American flag. *Pavlou* v. *Ocean Traders Marine Corporation,* 211 F. Supp. 320 (1962).

POINT II

The law of the flag should not be applied in the instant case.

Although a great deal of emphasis has been placed on "the law of the flag," this is not always the determinative factor in deciding which substantive law to apply in a particular case.

Approximately 5 years after the Supreme Court's decision in *Lauritzen* v. *Larsen,* 345 U. S. 571, 73 S. Ct. 921, the United States Court of Appeals for the Second Circuit decided the case of *Bartholomew* v. *Universe Tankships, Inc.,* 263 F. 2d 437, cert. denied, 359 U. S. 1000. The Court stated, at page 440, as follows:

> "Thus the Jones Act has often been applied although the 'flag of the ship' was foreign. E.g., Uravic v. F. Jarka Co., 1931, 282 U. S. 234, 51 S. Ct. 111, 75 L. Ed. 312; Gerradin v. United Fruit Co., 2 Cir., 1932, 60 F. 2d 927, certiorari denied 287 U. S. 642, 53 S. Ct. 92, 77 L. Ed. 556, Gambera v. Bergoty, 2 Cir., 1942, 132 F. 2d 414, certiorari denied 1943, 319 U. S. 742, 63 S. Ct. 1030, 87 L. Ed. 1699. Ownership of the vessel by American citizens was also lacking in the Uravic and Gambera cases."

The Court, in the *Bartholomew* case, *supra,* interpreting the Supreme Court's ruling in *Lauritzen* v. *Larsen, supra,* held that "* * * in a particular case something between minimal and preponderant contacts is necessary if the Jones Act is to be applied. Thus, we conclude that the test is that 'substantial' contacts are necessary." General Maritime Law requires less persuasion to be invoked in the

instant case. Both the provisions of the Jones Act and those of the General Maritime Law should be available to libelant to further the American concept of fair and substantial justice.

The application of foreign law would be tantamount to a denial of justice in the instant case.

POINT III

The petitioner cannot obtain just redress for his injuries in any other forum or by the application of foreign law.

The *Lauritzen* case, *supra,* and subsequent cases applying the law of the flag have done so on the basis that justice could best be served by relegating the parties to a common forum but never where the law of the flag was in such conflict with the law of the United States and the adoption of the law of the flag would result in a miscarriage or denial of justice.

Furthermore in the instant case there is no common forum to which the parties can be referred and the contacts with the United States are such as to warrant the application of United States law.

POINT IV

Norway neither in fact nor in law exercises any relationship or contact with the internal affairs of the vessel or the business of its owner except technically.

In the case at bar, the contacts with the United States are such as to warrant the application of the United States law.

The only contacts with the Kingdom of Norway existing in this case are the Norwegian flag of the vessel and the nationality of the owner.

Balanced against these factors are following:

1. Petitioner, although a Dutch national, was a legal resident-alien of the United States.

2. The petitioner signed on the vessel in New York, which was the usual port from which he shipped.

3. The respondents maintained a regular operating agent in New York, Fearnley & Eger, 39 Broadway, New York, which husbanded the vessel.

4. The respondents did and now do a substantial amount of business in the Port of New York, and for this purpose maintain the firm of Fearnley & Eger as general agent here.

5. Respondents are competing directly with American flag shipping.

Although the courts have considered the various factors as laid down by Mr. Justice JACKSON in *Laurtizen* v. *Larsen, supra,* the cases declining the application of American law can be distinguished on their facts from the instant case.

In most of the leading cases, the libelant and respondent were of the same nationality as the flag flown by the vessel.

In *Lauritzen* v. *Larsen, supra,* a Danish seaman was injured on a Danish ship, owned by a Danish ship owner.

In *Romero* v. *International Terminal Operating Co., et al.,* 358 U. S. 1958, the plaintiff was a Spanish seaman who had signed articles in Spain and was injured on board a Spanish ship, owned by a Spanish corporation.

In the case of *Smith* v. *Furness Withy & Co., Ltd.,* 119 F. Supp. 369, the plaintiff was a British subject, who was

injured on board a British flag vessel, owned by British interests while the vessel was in Bermuda.

In *Nakken* v. *Fearnley & Eger,* 137 F. Supp. 288, the libelant was a Norwegian citizen who had brought suit against the Norwegian owners of a vessel which flew the Norwegian flag.

All of these cases applying the law of the flag generally did so on the basis that all parties and the flag of the vessel were the same nationality.

POINT V

Provisions of General Maritime Law may not be denied on the basis of foreign law.

The controlling decisions in this country have made it manifestly clear that any foreign law which tends to limit or deny provisions of general maritime law to any seaman will be construed as being against public policy and thereby void.

As recently as May 23, 1962, Chief Judge SOBELOFF, in the case of *Blanco* v. *Phoenix Compania De Navegacion, S.A.,* 304 F. 2d 13 (1962), stated at page 15:

> "Moreover, certain decisions go further, strongly indicating that any attempt whatever by a ship to limit its liability to a seaman under the General Maritime Law is against public policy and ipso facto void, irrespective of the fairness of the terms of the agreement."

The effect to be given to foreign law is determined by local law.

Banco Nacional De Cuba v. *Sabbatino,* 27 F. R. D. 255 (1961); *Hilton* v. *Guyot* (1895), 159 U. S. 113, 16 S. Ct. 139, 40 L. Ed. 95; *Moscow Fire Ins. Co.* v. *Bank of New York &*

Trust Co. (1939), 280 N. Y. 286, 303, 20 N. E. 2d 758, affirmed by an evenly divided court, 1940, 309 U. S. 624, 60 S. Ct. 725, 84 L. Ed. 986.

POINT VI

The holding in the case of *Lauritzen* v. *Larsen, supra* is not controlling in the instant case.

The decision by Judge CROAKE in the case of *Pavlou* v. *Ocean Trades Marine Corporation,* 211 F. Supp. 320 (1962), pointed out the extent to which the holding in the *Lauritzen* v. *Larsen, supra,* was not controlling in a factual situation similar to the instant case (p. 325):

> "This court recognizes that the factor of base of operations was not emphasized by the Supreme Court in Lauritzen v. Larsen, 348 U. S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953). However, the court does not interpret that decision as an attempt by the Supreme Court to exhaust the factors which may be relevant. It is clear that there the court was only dealing with the circumstances which were present therein. Indeed, in the Bartholomew case, supra, at page 443 of 263 F. 2d, the Court of Appeals of this Circuit interpreted the Lauritzen decision in this way. Further, persuasive authority exists to support the view that the base of operations of the persons directing the operations of the vessel is a factor making the Jones Act applicable. In Southern Cross Steamship Co. v. Firipis, 4 Cir., 285 F. 2d 651 (1960), the court considered circumstances analogous to the instant case. The Court held then that where the owning corporation employed a general agent based in New York who directed the operations of the vessel, the Jones Act was applicable, in spite of the fact that 80% of the stock of the owning corporation was held by Greek citizens. It follows, therefore, that in cases such as this where the business connections with the country where the ship is registered and the place of incorporation of the owning corporation are minimal, an analysis of the

> base of operations of those who actively manage and direct the vessel is a more meaningful approach to the solution of this problem."

Our courts have always protected foreign seamen against injustice or denial of substantial rights.

The Roseville, D. C. Wash. 1935, 11 F. Supp. 150; *The Memphian,* D. C. Mass. 1917, 245 F. 484; *Caribbean Federation Lines* v. *Dahl* (1963), 315 F. 2d 370.

Judge McGOHEY *in Conte* v. *Rio De La Plata* (1959), 169 F. Supp. 164, stated at page 165:

> "The wage claim is clearly within the court's jurisdiction. In light of this and the other circumstances herein disclosed, sound discretion seems to me to require that jurisdiction be retained of all other claims asserted in the libel."

See: *The Fletero* v. *Arias,* 206 F. 2d 267; *Romero* v. *International Terminal Operating Co., supra; The M/V Tunous* v. *Skovgaard,* 358 U. S. 588, 79 S. Ct. 503; *Strathearn Steamship Co.* v. *Dillon,* 252 U. S. 348, 40 S. Ct. 350; *Bilbao* v. *M/S Ciudad De Ibaque,* 129 F. Supp. 725; *Savelis* v. *Vlachos,* 137 F. Supp. 389.

Judge IRVING R. KAUFMAN in the case of *Catherall* v. *Cunard S.S. Co.,* 101 F. Supp. 230, said at page 234:

> "Assuming the incorrectness of a trial, at law, of maintenance and cure, the cause could undoubtedly be brought on the admiralty side of the court. The district courts may take judisdiction in admiralty of maritime controversies between foreigners."

CONCLUSION

A Writ of Certiorari should issue to the United States Court of Appeals for the Second Circuit to review its judgment herein and on such review being granted, petitioner respectfully prays for an order of this Court reversing the said judgment.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioner.

APPENDIX

Decree Appealed From

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of January one thousand nine hundred and sixty-five.

Present:

HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
HON. ROBERT P. ANDERSON,
Circuit Judges.

EMILUS AUGUST TJONAMAN,
Libelant-Appellant,

v.

A/S GLITTRE and FEARNLEY & EGER,
Respondents-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs to the appellees.

A. DANIEL FUSARO
Clerk

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 103, Docket 28337.

Argued Oct. 22, 1964.

Decided Jan. 11, 1965.

EMILIUS AUGUST TJONAMAN,
Libelant-Appellant,

v.

A/S GLITTRE and FEARNLEY & EGER,
Respondents-Appellees.

Before:

FRIENDLY, KAUFMAN and ANDERSON, *Circuit Judges.*

ANDERSON, *Circuit Judge*:

On February 14, 1958 the libelant, Emilius August Tjonaman, a Dutch national, who had become a legal resident-alien in the United States twenty-nine days before, signed on as a member of the crew of M/S Ferngrove, a Norwegian owned and registered vessel. He was, and had been for about two years, a member of the Norwegian Seamen's Union, and it was through that organization and Scandinavian Shipping Office, Inc. that he obtained his berth on the ship. He signed the standard form of Norwegian shipping articles in the office of the Norwegian Consulate General in New York. The articles provided, among other things, that Tjonaman's rights and duties were those "stipulated in Norwegian legislation."

One month later, the libelant was injured aboard the vessel while it was in Ghanian waters. He sued in the United States District Court under the provisions of the Jones Act, 41 Stat. 1007 (1920), 46 U. S. C. § 688 (1952), and the general maritime law of the United States. During the course of the trial, he withdrew his Jones Act suit, but adhered to his claims under the general maritime law. The respondents countered with the assertion that it was not the law of this country, but the substantive law of Norway which applied to the case. The parties stipulated that at the trial there would first be heard and determined, on an agreed set of facts, the issue of whether United States or Norwegian law governed, and that thereafter they would be heard on the merits. On the first issue the district court ruled that Norwegian law applied. Whereupon the libelant conceded that he had no cause of action under Norwegian law, and the court ordered the libel dismissed on the merits. No testimony was offered as to the circumstances of the injury or as to the substantive provisions of Norwegian law. The sole question presented on this appeal is whether or not the court below was correct in deciding that Tjonaman could not invoke the general maritime law of the United States. We decide that the district court was correct and affirm the decision.

In *Lauritzen* v. *Larsen*, 345 U. S. 571, 73 S. Ct. 921, 97 L. Ed. 1254 (1953), *the Supreme Court listed seven factors* which, it said, were generally conceded to influence the choice of law to govern maritime tort claims. They were: the place of the wrongful act; the law of the flag; the national allegiance or domicile of the injured seaman; the national allegiance of the shipowner; the place of contract; the inaccessibility of a foreign forum; and the law of the forum. The Court discussed the weight to be accorded each of them and concluded that three were of particular significance; the law of the flag, the national allegiance of the shipowner, and the allegiance or domicile of the injured

seaman. The Court said that "cardinal importance" was to be attached to the law of the flag. In discussing the facts of the case before it, the Court commented that " * * * the weight given to the ensign overbears most other connecting events in determining applicable law" and that it "must prevail unless some heavy counterweight appears." Lauritzen v. Larsen, supra, 345 U. S. at 585-586, 73 S. Ct. at 930. This was a restatement of the settled American principle that the law of the flag controls matters relating to the internal economy or discipline of the ship. Cunard Steamship Co. v. Mellon, 262 U. S. 100, 123, 43 S. Ct. 504, 67 L. Ed. 894 (1923); Restatement, Conflict of Laws, § 405 (1954 Supp.).

Although Lauritzen v. Larsen, supra, involved a claim under the Jones Act, the Supreme Court expressly adopted its reasoning for adjudicating claims under the general maritime law in Romero v. International Terminal Operating Co., 358 U. S. 354, 382, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959). See generally, Currie, "The Silver Oar and All That: A Study of the Romero Case," 27 U. Chi. L. Rev. 1, 72 (1959); Note, "Admiralty and Choice of Law: Lauritzen v. Larsen Applied," 47 Va. L. Rev. 1400 (1961); Note, 36 Tul. L. Rev. 319 (1962).

The present case is readily distinguishable from the "flag of convenience" cases where the foreign registration is only nominal and the vessel belongs to the nation of the flag it flies only for the purpose of avoiding the shipping laws of the United States. Bartholomew v. Universe Tankships, Inc., 263 F. 2d 437 (2d Cir.), cert. denied, 359 U. S. 1000, 79 S. Ct. 1138, 13 L. Ed. 2d 1030 (1959); Southern Cross Steamship Co. v. Firipis, 285 F. 2d 651, 84 A. L. R. 2d 895 (4th Cir. 1960), cert. denied 365 U. S. 869, 81 S. Ct. 903, 5 L. Ed. 2d 859 (1961); Carroll v. United States, 133 F. 2d 690 (2d Cir. 1943); Gerradin v. United Fruit Co., 60 F. 2d 927 (2d Cir. 1932), cert. denied 287 U. S. 642, 53 S. Ct. 92, 77 L. Ed. 556 (1933).

Opinion of the United States Court of Appeals for the Second Circuit

In Bartholomew this court, however, not limiting itself to flag of convenience cases, broadly discussed a method of approach for deciding whether a seaman's claim is governed by the laws of the United States or by the laws of some other nation. The method called for the weighing and evaluating of the factors which consist of the contacts "between the transaction involved in the case and the United States and then deciding whether or not they are substantial." This has been interpreted as limiting the dominating importance of the law of the flag to cases with facts practically identical to the Lauritzen case. Brillis v. Chandris (U. S. A.) Inc., 215 F. Supp. 520, 522 (S. D. N. Y. 1963); Pavlou v. Ocean Traders Marine Corporation, 211 F. Supp. 320, 324 (S. D. N. Y. 1962); 47 Va. L. Review 1400 (1961).

Since the Bartholomew decision the Supreme Court has re-emphasized the paramount importance of the law of the flag. McCulloch v. Sociedad Nacional etc., 372 U. S. 10, 83 S. Ct. 671, 9 L. Ed. 2d 547 (1963). This leaves no doubt that the starting point for weighing and evaluating of factors is consideration of that law. The Court said, in Lauritzen, "Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag."

The ultimate issue, then, is whether the substantiality of other existing factors establishing a connection with the United States is sufficient to outweigh the "venerable and universal rule."

In marshaling the pertinent factors in the present case to consider the substantiality of those in support of the libelant's claims, we have before us the facts that the libelant had been for twenty-nine days a resident-alien in the United States, that he signed the articles in New York, that the M/S Ferngrove was frequently in and out of the Port of New York and that the owner, respondent A/S Glittre, maintained a general agent there.

The respondents, on the other hand, call attention to the facts that the libelant is a Dutch national, who had been for approximately two years a member of the Norwegian Seamen's Union, through which he procured a berth on a Norwegian owned and registered vessel, that he signed Norwegian shipping articles in the office of the Norwegian Consulate General in New York and agreed in the written articles that his rights and duties would be those stipulated by Norwegian law, that the libelant suffered the injury, on which he sued, on the vessel while it was in the Port of Takoradi, Ghana and that at no time had he prior thereto served as a crew man on a United States flag vessel.

The only factors in this case which are different from those in Lauritzen are (1) that the libelant's nationality was different from that of the vessel and (2) that he was an alien resident of the United States. Neither of these separately or in combination are sufficient to endow him with rights which substantially all of his shipmates do not have—particularly when he had joined a Norwegian union and signed Norwegian shipping articles. Smith v. Furness, Withy & Co., 119 F. Supp. 369 (S. D. N. Y. 1953).

The trial court, after considering the importance and significance of the factors present in the case, decided that the libelant had "failed to show sufficient factors to justify the application of American law instead of the law of the flag." We agree.

The judgment is affirmed.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS A/S GLITTRE AND FEARNLEY & EGER IN OPPOSITION

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Supreme Court of the United States

OCTOBER TERM, 1964

No. 1056

EMILIUS AUGUST TJONAMAN,

Petitioner,

against

A/S GLITTRE and FEARNLEY & EGER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS A/S GLITTRE AND FEARNLEY & EGER IN OPPOSITION

Opinions Below

District Judge Cooper's opinion holding that Norwegian law applied to libelant's cause of action has not been officially reported, but is unofficially reported at 1965 A.M.C. 61. The text of the opinion is set forth on pages 4a-15a of libelant-appellant's appendix in the United States Court of Appeals for the Second Circuit. The further proceedings of May 21, 1963, leading up to Judge Cooper's dismissal of the libel are set forth on pages 17a-21a of libellant-appellant's appendix in the United States Court of Appeals for the Second Circuit.

The opinion of the United States Court of Appeals for the Second Circuit affirming the dismissal of the libel is officially reported at 340 F. 2d 290, and unofficially reported at 1965 A.M.C. 57.

Jurisdiction

Petitioner asserts the jurisdiction of this Court under 28 U. S. Code §1254(1), but fails to show any present conflict between the Circuits or with prior decisions of this Court.

Questions Presented

We do not recognize the facts and the legal issues of this litigation in the two questions presented to this Court on page 3 of the petition.

The sole question presented by this case is whether the Court of Appeals was correct in affirming District Judge Cooper's ruling on the basis of the 10 enumerated paragraphs of stipulated facts that the Norwegian law rather than the general maritime law of the United States applied to petitioner's cause of action. There can be no question raised as to the subsequent dismissal of the libel, because the dismissal was based upon a failure of proof, there having been no proof offered as to the circumstances of the injury or the substantive provisions of the Norwegian law. Accordingly, respondents respectfully suggest that the only question which can be presented in this case is:

Whether, in the absence of a showing of conflict between the Circuits and in the absence of any claim that the result obtained below is in conflict with the prevailing decisions of this Court in *J. Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) and *Romero* v. *International Terminal Operating Co., et al.*, 358 U. S. 354 (1958), this Court should undertake to review the conclusion of the District Judge and the unanimous affirmance of the three Judges of the United States Court of Appeals for the Second Circuit, holding that petitioner had failed to show sufficient factors to justify the application of American law aboard the Norwegian vessel?

Statement

The ten enumerated statements of fact which counsel had agreed should govern the determination of applicable law are set forth on pages 3 and 4 of the petition. Exhibits A and B referred to in paragraph 6 of the stipulated facts are set forth in respondent's appendix to their brief in the United States Court of Appeals for the Second Circuit.

The relevant facts can be paraphrased as follows:

On February 14, 1958 petitioner, a Dutch national born in Dutch Guiana who had become a legal resident-alien in the United States four weeks earlier, joined m/s Ferngrove in New York as a member of the crew. M/s Ferngrove was a Norwegian flag vessel duly registered in Oslo. Respondent A/S Glittre, the registered owner of that vessel, was a Norwegian corporation. Respondent Fearnley & Eger, the managing owner of m/s Ferngrove, was a Norwegian partnership. Petitioner, who had been a member of the Norwegian Seamen's Union for approximately two years, obtained employment on m/s Ferngrove through that Union and the Scandinavian Shipping Office, Inc. Petitioner signed standard-form Norwegian shipping articles at the office of the Royal Norwegian Consulate General in New York, which articles called for employment subject to the rights and duties set forth in the Norwegian law. Petitioner had previously served aboard other Norwegian flag vessels; he had never served aboard any United States flag vessels. Approximately one month later petitioner sustained an injury aboard m/s Ferngrove while that vessel was in West African waters.

It had been agreed further between counsel that the first matter to be decided was what substantive law was to be applied to petitioner's cause of action, that is, whether the general maritime law of the United States and the Jones Act (46 U. S. Code § 688) or the Norwegian law. During the course of the trial petitioner withdrew all

claims to the applicability of the Jones Act and relied solely upon the general maritime law of the United States.

On April 23, 1963, the Trial Judge handed down an opinion holding that Norwegian law applied to petitioner's cause of action. The trial then proceeded to the second stage involving issues of liability, injuries and damages. Petitioner offered no proof on these issues, and the Trial Judge dismissed the libel on May 21, 1963.

Petitioner appealed to the United States Court of Appeals for the Second Circuit from the judgment dismissing the libel. The appeal was argued on October 22, 1964. On January 11, 1965, Circuit Judge Anderson writing for an unanimous Bench affirmed the dismissal of the libel after stating that the Court was in agreement with the Trial Judge's conclusion that Norwegian law was to be applied to the cause of action. The Court of Appeals recognized that the libel had been dismissed for failure of proof and that

> "The sole question presented on this appeal is whether or not the court below was correct in deciding that Tjonaman could not invoke the general maritime law of the United States." (340 F. 2d 291)

Argument

There Is No Conflict of Decision.

The petition does not contain any assertion that the decision of the United States Court of Appeals is in conflict with any decision of this Court, of any U. S. Court of Appeals or the highest Court of any of our 50 States.

Petitioner leads off by quoting from *Stewart* v. *Pacific Steam Navigation Co.*, 3 F. 2d 329 (SDNY 1924) for the proposition that the intent of Congress was to have the Jones Act apply to whatever foreign shipping might

be sailing in competition with American flag vessels. This decision, handed down 29 years before the ruling of this Court in *J. Lauritzen* v. *Larsen,* 345 U. S. 571 (1953), arose out of a motion by the shipowner to set aside service of a summons on the contention that the *venue* provisions of the Jones Act did not provide for an action being brought against a corporation organized outside the United States. This appraisal of Congressional intent was specifically rejected by this Court in *J. Lauritzen* v. *Larsen, supra,* when Mr. Justice Jackson closed the majority opinion at 345 U. S. 593, writing as follows:

> "In apparent recognition of the weakness of the legal argument, a candid and brash appeal is made by respondent and by *amicus* briefs to extend the law to this situation as a means of benefiting seamen and enhancing the costs of foreign ship operation for the competitive advantage of our own. We are not sure that the interest of this foreign seaman, who is able to prove negligence, is the interest of all seamen or that his interest is that of the United States. Nor do we stop to inquire which law does whom the greater or the lesser good. The argument is misaddressed. It would be within the proprieties if addressed to Congress. Counsel familiar with the traditional attitude of this Court in maritime matters could not have intended it for us."

Petitioner cites *Bartholomew* v. *Universe Tankships, Inc.,* 263 F. 2d 437 (2 C. A. 1959), cert. den. 359 U. S. 1000 as supporting his arguments. In the *Bartholomew* case the injury occurred within the territorial waters of the United States, the hiring took place in Baltimore, and the plaintiff, although a British West Indian subject, was a New York resident who had gone so far as to file a declaration of intention to become an American citizen. The application of United States law was based not upon the residence of the plaintiff, but upon the basis that the ultimate ownership was in the hands of citizens of the United States. In order to establish the distinction between the

facts in *Bartholomew* and the stipulated facts in this suit it should be sufficient to quote from the decision of the United States Court of Appeals for the Second Circuit as reported at 263 F. 2d 441:

> "Appellant is a Liberian corporation and the Ulysses flew the Liberian flag. But all the stock of the Liberian corporation is held by a Panamanian corporation, and all the stock of the Panamanian corporation is owned by citizens of the United States. All the officers of appellant are American citizens, its principal place of business is in New York City, and it maintains an office in Liberia as a mere formality to comply with the Liberian statutory requirements."

In short, the Liberian flag of the vessel and the nationality of the ostensible owner were in no way reflective of true ownership and control. The decision of the United States Court of Appeals in *Bartholomew* is in line with the comments of Mr. Justice Jackson in *J. Lauritzen* v. *Larsen*, at 345 U. S. 587, when he recognized that a practice had grown among American shipowners to avoid stringent shipping laws by seeking foreign registrations, and that when confronted with such operations our Courts on occasion had pressed beyond the formalities of more or less nominal foreign registration in order to enforce against American shipowners the obligations which our American law placed upon them. In so commenting Mr. Justice Jackson pointed out that such a rule did not apply to the facts of that case, since it appeared beyond doubt that J. Lauritzen was a Dane by nationality and domicile.

In the instant case the stipulated facts leave no room for claims of a runaway flag or a flag of convenience. On the other hand, they show that respondent, A/S Glittre, the registered owner of the vessel, was a Norwegian corporation and the owner of m/s Ferngrove, a Norwegian flag vessel duly registered in Norway. The facts also showed

that respondent, Fearnley & Eger, was a Norwegian partnership and was the managing owner of the vessel.

The headnote on page 9 of the petition does not reflect prevailing law. The case of *Blanco* v. *Phoenix Compania de Navigacion, S.A.*, 304 F. 2d 13 (4 C. A. 1962) does not stand for the proposition stated by petitioner. Petitioner has taken a sentence from page 15 of the opinion and has offered it to this Court as support for the argument that the general maritime law of the United States will intercede, as a matter of public policy, on behalf of any seaman who can establish that the foreign law to which he might be subject would limit what would otherwise have been his rights under our general maritime law. Even a cursory reading of the *Blanco* case indicates that this was not the ruling of the Court. This was a personal injury claim by a Spanish seaman who had been injured aboard a Liberian flag vessel. The contract of employment, that is, the hiring articles, limited the monetary recovery for personal injuries. The question was whether this monetary limitation was valid. The seaman claimed the benefits of the Jones Act and our general martime law, stating that whereas the vessel was ostensibly owned by a Liberian corporation, it was in fact controlled by United States citizens. Interrogatories were addressed to the shipowner in an effort to develop facts with respect to ownership, operation and control. In the face of these interrogatories the owners *admitted* that libelant was entitled to the benefits of the laws of the United States. As a result, the Jones Act and our general maritime law were *ipso facto* applicable to the suit. At that point the restrictive provisions in the hiring articles were stricken by the Court as being against public policy since they ran contra to the provisions of *our* laws. There was no holding in *Blanco* that foreign law was void if it limited or denied the provisions of our general maritime law. Foreign law was not involved in the *Blanco* case, because the shipowner had conceded that the seaman's claims were governed by United States law.

The cases cited on page 11 of the petition are of no value, because in this case the respondents have never contested the jurisdiction of the District Court, sitting in Admiralty, to adjudicate the controversy between the parties on the basis of whatever law the Court might have found to be applicable. The discretionary jurisdiction of the Court sitting in Admiralty has never been in issue. In *J. Lauritzen* v. *Larsen, supra,* at 345 U. S. 591, Mr. Justice Jackson rejected the argument that when an American forum had perfected its jurisdiction over the parties, it should apply its own law to the controversy between them. As he pointed out, the purpose of our conflict-of-laws doctrine was to assure that a case would be treated in the same way under the appropriate law regardless of the fortuitous circumstances which might determine the forum.

The decision of the United States Court of Appeals is plainly not in conflict with the prevailing rules established by this Court in *J. Lauritzen* v. *Larsen,* 315 U. S. 571 (1953), and *Romero* v. *International Terminal Operating Co., et al.,* 358 U. S. 354 (1958).

J. Lauritzen v. *Larsen, supra,* is still the leading authority in the field. The cardinal importance to be ascribed to the law of the flag has more recently been reemphasized in *McCullough* v. *Sociedad Nacional, et al.,* 372 U. S. 10 (1963).

The opinion of the Trial Judge (4a-15a) and the affirming opinion of the United States Court of Appeals for the Second Circuit (340 F. 2d 290) show that more than mere lip service was paid to the decision of this Court in *J. Lauritzen* v. *Larsen, supra,* in arriving at the conclusion that the factors establishing a connection with the United States in suit were insufficient to outweigh the venerable and universal rule giving cardinal importance to the law of the flag, and did not justify the application of American law aboard the Norwegian vessel.

There Is No Important Question of Federal Law.

The only question posed by this case is whether petitioner's month old status as a resident alien in the United States should be sufficient to endow petitioner with rights under the United States laws which substantially all of his shipmates did not have. In researching the problem only one other post-*Larsen* case involving a similar fact situation has been found. *Smith* v. *Furness, Withy & Co., Ltd.*, 119 F. Supp. 369 (SDNY 1953) involved a plaintiff who was a British subject but a resident of the United States. The injury occurred aboard the British vessel in foreign waters. The Court concluded, after applying the factors listed in *J. Lauritzen* v. *Larsen, supra,* that the law of the flag was to be applied. There was no appeal taken from the decision. The only other post-*Larsen* case we have been able to find is *Bartholomew* v. *Universe Tankships, Inc., supra,* where the law of the flag was rejected, not because plaintiff was a resident-alien of the United States, but because the flag did not reflect the true ownership of the vessel. Even if Bartholomew had been a non-resident-alien the decision to apply United States law would still have been compelled because of the domestic ownership, operation and control of the vessel. *Bartholomew* has to belong with "runaway flag" or "flag of convenience" cases.

Twelve years have gone by since the *J. Lauritzen* v. *Larsen, supra,* decision, and there has been only one case even remotely similar to the present one. That was, of course, *Smith* v. *Furness, Withy & Co., Ltd., supra.*

We submit that the matters set forth in the petition do not warrant the time and attention of this Court. A decision by this Court on the merits of the suit can add nothing to the present state of the law. The criteria and the weight to be ascribed to the various factors in determining applicable law in the foreign flag cases have been set forth more than adequately in the existing decisions of

this Court. Our Courts of Appeal have not demonstrated any difficulty in applying those standards. Furthermore, any decision by this Court would have to be limited to the particular stipulated facts of the case and would have little or no value as a future guide to other cases even if we were to assume that the employment of legal U. S. residents aboard foreign flag vessels was prevalent. The dearth of cases on the subject would indicate that the instances are rare indeed.

The Decision Below Is Clearly Correct.

The stipulated facts and the holdings in *J. Lauritzen* v. *Larsen, supra,* compel the conclusion that the Court below was correct in affirming on the grounds that petitioner had failed to show sufficient factors to justify the application of United States law instead of the law of the flag.

Both the Trial Judge and the United States Court of Appeals for the Second Circuit applied meticulously the seven tests which this Court stated in *J. Lauritzen* v. *Larsen, supra,* should be made in order to determine the law to govern a maritime tort claim.

The first test, Place of the Wrongful Act, is on all fours with the facts in *Larsen.* The plaintiff in *Larsen* was injured aboard the vessel in Cuban waters. Petitioner was injured aboard the vessel in West African waters. To the same extent that neither party in the *Larsen* case was urging the applicability of Cuban law, neither of the parties here urges upon the Court the applicability of the laws of Ghana. The holding at 345 U. S. 583, 584 that the test of location of the wrongful act is of only limited application to shipboard torts (reaffirmed in *Romero* v. *International Terminal Operating Co., et al., supra,* six years later) eliminates the significance of this test in deciding the choice of law.

The second factor, Law of the Flag, points strongly to the applicability of Norwegian law. This Court stated at 345 U. S. 584, 585 that the law of the flag was to be given "cardinal importance", and continued by stating that "the weight given to the ensign overbears most other connecting events in determining applicable law." The flag in *Larsen* was Danish and the Danish law was held to be applicable. The flag in the instant suit is Norwegian, and the registered owner and the managing owner of the vessel, the respondents to the suit, were both Norwegian.

There is no factual basis for a finding that the Norwegian flag of m/s Ferngrove was other than a true reflection of the ownership, management and operation of that vessel. The law referred to in the hiring articles (Exhibits A and B to the Stipulation of Facts; 1b) was the Norwegian law. The law referred to in hiring articles has importance as a confirming element when it conforms to what would otherwise be applicable law. It would have no significance if it were inserted in the contract in an effort to *avoid* what would otherwise be applicable law. As stated in *J. Lauritzen* v. *Larsen, supra,* at pages 588-589:

> "We are aware of no public policy that would prevent the parties to this contract, which contemplates performance in a multitude of territorial jurisdictions and on the high seas, from so settling upon the law of the flag-state as their governing code. This arrangement is so natural and compatible with the policy of the law that even in the absence of an expressed provision it would probably have been implied."

The third test listed in *Larsen* was Allegiance or Domicile of the Injured. The question is whether petitioner's status as a one month old resident-alien is sufficient of itself to counteract all the other indicators pointing to Norwegian law. It will be remembered that petitioner was

member of the Norwegian Seamen's Union and that he obtained his employment through Norwegian channels, signing hiring articles in the Royal Norwegian Consulate General in New York on the standard Norwegian form calling for the application of Norwegian law.

Did petitioner's newly-acquired status as a resident entitle him to board m/s Ferngrove carrying with him the general maritime law of the United States indicating that whereas Norwegian law might govern the employer-employee relationship of the other members of the crew, he was to serve aboard subject to the rights, duties and obligations set forth in our laws? We submit that the opinion in *J. Lauritzen* v. *Larsen* answered this question at 345 U. S. 586 by stating:

> "Surely during service under a foreign flag some duty of allegiance is due."

The fourth test is Allegiance of the Defendant Shipowner, and here we could paraphrase the *Larsen* opinion (345 U. S. 588) and state that the utmost liberality in disregard of formality does not support the application of American law in this case, for it appears beyond doubt that this owner is a Norwegian by nationality and domicile. The stipulated facts on the basis of which the choice of law question was decided in the District Court do not permit any contrary conclusion. There is no evidence that either respondent is other than a legitimate Norwegian business entity owning and operating a duly registered Norwegian flag vessel in international commerce.

In arguing to this Court petitioner goes beyond the stipulated facts (pp. 5 and 8 of the Petition) by stating that respondents obviously do a great deal of business in the Port of New York, that New York was the port from which petitioner usually signed on and that respondents

maintained a regular agent in New York for husbanding the vessel. Even assuming the truth of these statements for the sake of argument, they do not alter the basic picture. That m/s Ferngrove, a Norwegian flag vessel, may have been in competition, direct or otherwise, with vessels flying the American flag is not a valid reason for determining the law to be applied as between the Norwegian owner and the members of the crew of that vessel. *J. Lauritzen* v. *Larsen,* 345 U. S. 592-3 (1953). Obviously, the operation of a vessel in international commerce requires that her owners do business in various countries. American flag vessels running in liner services between United States and Scandinavian ports would be exposed to a similar claim with respect to their calls at these Scandinavian ports. We are minded of this Court's caution that:

> "* * * in dealing with international commerce we cannot be unmindful of the necessity for mutual forebearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction." (345 U. S. 582)

Nor can the presence of a husbanding agent in a port of call be a basis for application of local law to events occuring aboard the vessel. To the same extent that American vessels have agents in their foreign ports of call, so do foreign vessels have agents in their U. S. ports of call.

While on the subject of claims totally outside the stipulated facts, we submit that it is not significant that m/s Ferngrove may or may not have been calling regularly at U. S. ports during the course of her international travels. S/S Randa, the vessel involved in *J. Lauritzen* v. *Larsen, supra,* was engaged in a regular cargo liner service between U. S. East Coast and South American West Coast ports. Similarly, s/s Guadalupe, the vessel involved in *Romero*

v. *International Terminal Operating Co., et al., supra,* was engaged in a regular passenger and freight liner service between U. S. East Coast ports and Spain. There was no holding in either case that regular calls of the vessel or the presence of an agent in the United States had any bearing on the choice-of-law decision. The smooth continuity of international commerce by sea requires that every effort be made to have crew matters governed by a constant standard rather than by the inevitable fluctuations and variations which would be imposed by reference to the law of the particular port at which the vessel might happen to be.

The fifth test considered in *Larsen* was Place of Contract, and here there is absolute identity between the *Larsen* facts and the facts of this case. If it did anything, the *Larsen* decision eliminated the place of contract as a substantial influence in the choice between competing laws to govern a maritime tort.

The last two factors, Inaccessibility of Foreign Forum and Law of the Forum, have been commented upon earlier in this brief. Inaccessibility of Foreign Forum is not an element in this case, since respondents have not challenged the discretionary jurisdiction of the Court to adjudicate the suit between the parties. There has been no contention that petitioner should or would have to proceed to Norway in order to have his case adjudicated.

The seventh and last factor, Law of the Forum, is again on all fours with the *Larsen* case and must be eliminated as non-determinative because:

> "Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable." (345 U. S. 591)

We submit that the Court below was correct when it stated that petitioner's status as an alien resident of the United States was insufficient to endow him with rights which substantially all of his shipmates did not have, and that the Court was correct in concluding that petitioner had failed to show sufficient factors to justify the application of American law instead of the law of the flag.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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JAMES M. ESTABROOK,
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May 5, 1965.

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IN THE

Supreme Court of the United States

October Term, 1964

No. 1056

EMILIUS AUGUST TJONAMAN,

Petitioner,

against

A/S GLITTRE and FEARNLEY & EGER,

Respondents.

PETITION FOR REHEARING

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On the Petition:
LEONARD H. WALLACH.

IN THE

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October Term, 1964

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Respondents.

PETITION FOR REHEARING

To the Justices of the Supreme Court of the United States:

PETITIONER respectfully petitions this Court to rehear the petition for certiorari on the following substantial grounds not previously presented, pursuant to R. 58, subd 2 (*Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50, 59 S. Ct. 8, 9).

Section 1 of Art. III, Section 1 of Art. IV and Section 1 of Art. V of the treaty between the Netherlands and the United States (8 U. S. T. 2043, 2047-2049) reads as follows:

"NETHERLANDS

FRIENDSHIP, COMMERCE AND NAVIGATION

Treaty, with protocol and exchange of notes, signed at The Hague March 27, 1956;
Ratification advised by the Senate of the United States of America July 11, 1956;
Ratified by the President of the United States of America September 14, 1956;

Ratified by the Netherlands September 20, 1957;
Ratifications exchanged at Washington November 5, 1957;
Proclaimed by the President of the United States of America November 15, 1957;
Entered into force December 5, 1957.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS a treaty of friendship, commerce and navigation between the United States of America and the Kingdom of the Netherlands, together with a protocol and an exchange of notes relating thereto, was signed at The Hague on March 27, 1956;

WHEREAS the originals of the said treaty and protocol in the English and Netherlands languages and the text of the exchange of notes signed in the English language are word for word as follows:
Treaty of Friendship, Commerce and Navigation between the United States of America and the Kingdom of the Netherlands (TIAS 3942)

* * *

ARTICLE III

(p. 2046) 1. Nationals of either Party * * * shall be accorded in like circumstances treatment no less favorable (TIAS 3942) (p. 2047) than that accorded nationals of such other Party for the protection and security of their persons and their rights. The treatment accorded in this respect shall in no case be less favorable than that accorded nationals of any third country or that required by international law.

* * *

ARTICLE IV

1. Nationals of either Party shall be accorded national treatment in the application of laws and regulations within the territories of the other Party that (TIAS 3942) (p. 2048) establish a pecuniary compensation or other benefit or service, on account of disease, injury or death arising out of and in the course of employment or due to the nature of employment.

2. In addition to the rights and privileges provided in paragraph 1 of the present Article, nationals of either Party shall, within the territories of the other Party, be accorded national treatment in the application of laws and regulations establishing compulsory systems of social security, under which benefits are paid without an individual test of financial need in the following cases: (*a*) sickness, including temporary disability for work, and maternity; (*b*) invalidity, or occupational disability; (*c*) death of father, spouse, or any other person liable for maintenance; (*d*) unemployment.

ARTICLE V

1. Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of (TIAS 3942) (p. 2049) either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication. (TIAS 3942)

* * *

It is respectfully submitted that under the provisions of Sec. 1 of said Art. IV, it is intended that petitioner, a national of the Netherlands, was lawfully entitled to the application of American law by the Courts below, the said Treaty being binding on all the Courts of the land.

The Court below had affirmed on the ground that petitioner was not entitled to the application of American law.

The intent of the treaty, to treat petitioner as if he were a U. S. national, is clearly expressed in Art. III, Art. IV and Art. V, as quoted.

WHEREFORE petitioner respectfully petitions this Court to rehear the petition herein and, on such rehearing being

had, prays for reversal of the judgment below and for such other and further relief as may be just.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioner.

On the Petition:

LEONARD H. WALLACH.

Certificate of Counsel

Counsel for petitioner hereby certifies that this petition for rehearing is presented in good faith and not for delay and further certifies that the petition is restricted to the grounds set forth in R. 58, subd. 2.

JACOB RASSNER,
Counsel for Petitioner.